ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition on Behalf of the	)	
Louisiana Public Service	)	PR Docket No. 94-107
Commission for Authority to Retain	)	
Existing Jurisdiction over	)	
Commercial Mobile Radio Services	)	
Offered Within the State of	)	
Louisiana	)	

To: The Commission

REPLY OF RADIOFONE, INC.

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Dated: October 4, 1994

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SUMMARY

Radiofone, Inc. (Radiofone) submits this Reply in response to comments concerning the Petition of the Louisiana Public Service Commission (LPSC) requesting permission to retain regulatory authority.

Radiofone filed comments in this proceeding, supporting the LPSC's request for authority to continue its existing form of regulation of commercial mobile radio services (CMRS) providers.

Radiofone submits that the LPSC has met the statutory and regulatory requirements for retaining its existing regulatory authority. The LPSC demonstrated repeated occasions on which it was called upon by subscribers, carriers (including Radiofone), and the FCC to remedy unreasonable or discriminatory intrastate rates. Several commenters, including BellSouth, GTE and McCaw, misconstrue the FCC's jurisdiction under Title II of the Communications Act of 1934, as amended (the Act), and erroneously assert that the FCC can remedy such market failures concerning intrastate rates. Rather, only the LPSC can. As the FCC has retained its own authority under Title II to protect subscribers of interstate CMRS services, the FCC should permit the LPSC to retain its intrastate existing regulatory authority.

However, the LPSC's authority should not be extended to include rate of return regulation. Neither Radiofone nor any other commenter supports the imposition of any form of rate of return regulation for CMRS providers. Rate of return regulation for CMRS providers should be prohibited by the FCC.

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To: The Commission

REPLY OF RADIOFONE, INC.

Radiofone, Inc. (Radiofone), by its attorneys, respectfully submits this Reply to the comments concerning the above-captioned Petition filed by the Louisiana Public Service Commission (LPSC).[1] This Reply is submitted pursuant to the Public Notice announcing the state petitions.[2]

I. INTEREST OF RADIOFONE

Radiofone provides one-way (paging) and two-way (cellular) mobile services in Louisiana.

Radiofone filed comments in this proceeding, supporting the LPSC's request for authority to continue its existing form of regulation of commercial mobile radio services

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[1]This Reply responds to comments filed by: BellSouth Corporation (BellSouth), Century Cellunet, Inc. (Century), Cellular Telecommunications Industry Association (CTIA), GTE Service Corporation (GTE), McCaw Cellular Communications, Inc. (McCaw), Mercury Cellular Telephone Company and Mobiletel, Inc. (Mercury), National Cellular Resellers Association (NCRA), Nextel Communications, Inc. (Nextel), and Personal Communications Industry Association (PCIA).

[2]State Petitions to Retain Authority over Intrastate Mobile Service Rates, 59 Fed. Reg. 42,595, 42,595 (1994) (Public Notice).

(CMRS) providers.[3]

Radiofone submits that the LPSC has met the statutory and regulatory requirements for retaining its existing regulatory authority. The LPSC demonstrated repeated occasions on which it was called upon by subscribers, carriers (including Radiofone), and the FCC to remedy unreasonable or discriminatory intrastate rates.[4] Several commenters, including BellSouth, GTE and McCaw, misconstrue the FCC's jurisdiction under Title II of the Communications Act of 1934, as amended (the Act), and erroneously assert that the FCC can remedy such market failures concerning intrastate rates.[5] But only the LPSC has the jurisdiction to protect subscribers of intrastate CMRS services. As the FCC has retained its own authority under Title II to protect subscribers of interstate CMRS services, the FCC should permit the LPSC to retain its intrastate regulatory authority -- as NCRA requests.[6]

However, the LPSC's authority should not be extended to include rate of return regulation. Neither Radiofone nor any other commenter supports the imposition of any form of rate of return regulation for CMRS providers. Rate of return regulation for CMRS providers should be prohibited by the FCC.

These points are discussed in turn.

II. THE LPSC SATISFIES THE STATUTORY AND REGULATORY REQUIREMENTS FOR RETAINING REGULATORY AUTHORITY

In order to retain its regulatory authority, the LPSC is statutorily obligated to show,

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[3]Radiofone Comments at 2-6.

[4]E.g., LPSC Petition at 9, 13, 16, 33.

[5]BellSouth Comments at 19 n.15, 23; GTE Comments at 3, 11; McCaw Comments at 30.

[6]NCRA Comments at 6.

pursuant to Section 332(c)(3) of the Act,[7] that the CMRS market conditions "fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." Thus, contrary to assertions made by commenters in this proceeding,[8] the LPSC does not need to quantify the degree of competition in the CMRS market. The LPSC needs to show only that the market does not protect subscribers adequately -- and the LPSC did so. The LPSC averred that it receives approximately 260 complaints each year concerning CMRS services.[9] The LPSC described, for example, how it remedied BellSouth's discriminatory application of its corporate rates, ordered a reduction in Louisiana 8's roaming charges, and resolved complaints referred by the FCC.[10] Thus, the LPSC has satisfied the statutory requirements for retaining its regulatory authority.

Additionally, the LPSC has satisfied the three requirements provided in the Commission's Rules. First, the requirement to show that market conditions do not adequately protect subscribers,[11] is satisfied by the statutory showing discussed above. Second, the requirement that the LPSC demonstrate that it is the duly authorized agency to be filing the petition, is satisfied by the LPSC's corresponding statement in its Petition.[12] Finally, the requirement that the LPSC identify the regulation it will employ if the petition is granted, is satisfied by the LPSC's lengthy discussion of its constitutional and statutory

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[7]47 U.S.C. § 332(c)(3).

[8]E.g., Century Comments at 7 (asserting that the LPSC did not demonstrate a lack of competition); see also GTE Comments at 15; CTIA Comments at 12-17 (asserting that cellular market is competitive); Nextel Comments at 15 n.20.

[9]LPSC Petition, Exhibit 11 (Affidavit).

[10]Id. at 9-10, 16, 18-19, 33.

[11]47 C.F.R. § 20.13(a)(1).

[12]LPSC Petition at 3, Exhibit 2.

mandate of regulatory responsibility and authority, including the statutes applicable to radio common carriers,[13] and the LPSC's application thereof in resolving subscriber complaints and preventing discriminatory rates.[14]

Several commenters erroneously assert that the LPSC's Petition should be denied because the LPSC allegedly did not provide the information listed in Section 20.13(a)(2) of the Commission's Rules.[15] Those commenters are attempting to apply a rule that does not exist. The FCC made clear that a state has the "discretion to submit whatever evidence that state believes is persuasive regarding market conditions in the state and the lack of protection for CMRS subscribers in the state."[16] The LPSC submitted evidence of specific situations where subscribers were subject to unreasonable and discriminatory rates, and in doing so, fulfilled the statutory and regulatory requirements.

III. THE FCC SHOULD ALLOW THE LPSC TO PROTECT SUBSCRIBERS OF INTRASTATE SERVICES FROM UNREASONABLE AND DISCRIMINATORY RATES

NCRA agrees with Radiofone that the FCC should permit the LPSC to retain its existing regulatory authority in order to protect subscribers. Most of the other commenters oppose the retention of such authority. Their reasons include desires to have unfettered discretion in charging subscribers for CMRS service, and exhibit a fundamental misunderstanding of the FCC's jurisdiction under Title II of the Act, as discussed below.

It is not surprising that BellSouth opposes retention of rate regulation by the LPSC.

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[13]Id. at 4-6.

[14]Id. at 6-48. Thus, PCIA's assertion that the LPSC "failed to provide specifics" should be rejected. PCIA Comments at 14 & n.33.

[15]47 C.F.R. § 20.13(a)(2). E.g., GTE Comments at 15; Century Comments at 6-7.

[16]Second Report and Order (Implementation of Sections 3(n) and 332 of the Communications Act), 9 FCC Rcd. 1411, 1504 (1994) (emphasis added).

BellSouth's exploits were mentioned in half of the LPSC's Exhibits concerning complaints handled by the LPSC.[17] BellSouth's opposition shows that BellSouth does not want subscribers -- or other carriers -- to have a forum to which to turn to resolve issues concerning BellSouth's rates. BellSouth apparently wants the leeway to employ rates of its own choosing, without any constraints and any potential regulatory or judicial oversight. The record clearly demonstrates that BellSouth cannot be relied upon to self-enforce its offerings to the public.[18]

Commenters that oppose rate regulation completely and conveniently ignored the LPSC's accounting of the numerous times it has had to intervene to protect subscribers.[19]

Still other commenters hurry to point out that, although the LPSC has been called

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[17]In spite of BellSouth's assertion that only "a few complaints" cited in the LPSC Petition address rate matters, a review of the referenced material discloses that, in fact, most of those exhibits mentioning BellSouth concern BellSouth's rates.

BellSouth also puts a misleading spin on its misapplication of corporate rates. BellSouth defends them as promotional offerings. BellSouth Comments at 23. However, the rates were offered to individuals. Radiofone brought this matter to the attention of the LPSC, and was glad to have the LPSC step in when it did to prevent a disruptive dispute with BellSouth Mobility. Although BellSouth admits that discrimination may have been involved, BellSouth's suggested solution -- for subscribers to bring such complaints to the FCC -- is not possible because the FCC does not have jurisdiction over intrastate rates, as discussed further herein. Id.

[18]E.g., LPSC Petition at 15-17, Exhibit 18.

[19]E.g., PCIA Comments at 11-12; GTE Comments at 21-23 (providing a heading alleging insufficient evidence, but not discussing any evidence presented by any state); CTIA Comments at 13 (concluding regulation is not necessary to protect subscribers without considering the evidence of unreasonable and discriminatory rates presented by the LPSC); McCaw Comments at 5, 24 (asserting that the LPSC has not shown any benefits of its past regulation of cellular carriers).

Nevertheless, McCaw did specifically address allegations by the LPSC concerning alleged "conscious parallel pricing" and "market division," and agrees with Radiofone on those issues. McCaw Comments, Exhibit A, at 13-14; see also McCaw Comments at 25-26; Radiofone Comments at 4-6. The behavior described by the LPSC is evidence of competitive behavior, not anticompetitive conduct. McCaw Comments, at 26, Exhibit A, at 13-14; Radiofone Comments at 5-6.

upon to resolve market anomalies, the number of such instances is not high, by the commenters' standards.[20] Thus, the commenters admit, albeit reluctantly, -- and agree with the LPSC -- that the LPSC has employed light-handed regulation.[21] The commenters' fears of the effects of continued existing regulation are over-exaggerated.

Caught in the middle of this dispute are the CMRS subscribers. None of the commenters opposing LPSC regulation represent the subscribers, yet it is the subscribers who will lose if the FCC does not permit the LPSC to retain its regulatory authority.[22] As noted by NCRA, if the LPSC is not given the authority to continue to regulate rates, the CMRS subscribers and carriers will have no one to turn to to remedy unreasonable and discriminatory rates.[23]

The FCC has made clear that it can regulate only interstate rates, and that issues concerning intrastate rates will be left to the states to resolve -- but only if they are granted such authority by the FCC. The FCC stated, "The revised Section 332 does not extend the

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[20]E.g., Century Comments at 6-7. While asserting that the LPSC has not provided evidence of the benefits of its regulatory oversight, Century encloses a letter, dated August 31, 1994, from the LPSC (Century Exhibit 5) explaining the LPSC's conclusion that it receives 260 complaints per year concerning CMRS service, LPSC Petition Exhibit 11. The summary Century provides as Exhibit 6, includes only those complaints which the LPSC forwarded to Century. Thus, it does nothing to dispute the LPSC's affidavit concerning the number of complaints it receives each year.

[21]See LPSC Petition at 1.

[22]BellSouth seeks to minimize the significance of complaints received by the LPSC as telephone calls from subscribers. BellSouth Comments at 18. If the LPSC is not granted the authority to retain its present form of regulation, the LPSC will no longer be able to handle such complaints, whether presented on paper or by telephone.

[23]NCRA Comments at 5-6 ("[T]here is no Federal oversight in place to protect consumers. Only the existing state regulation represented by the current petitions is available in the petitioning states for this purpose.").

Commission's jurisdiction to the regulation of local CMRS rates."[24] Put simply: Title II of the Act still does not apply to intrastate CMRS services.

GTE, McCaw and BellSouth do not recognize this limit on the FCC's Title II jurisdiction. GTE erroneously asserts that state regulatory authority would be "duplicative" of federal regulatory authority.[25] But there will be no "duplication" because Congress did not give the FCC authority over intrastate CMRS rates. GTE further erroneously asserts that if a state shows evidence of discriminatory rates, the state would be demonstrating a violation of the Act.[26] However, discriminatory intrastate rates are certainly not a violation of the Act, which governs only interstate rates.

McCaw erroneously asserts that the LPSC must show that "whatever unique competitive problems it has identified cannot be adequately addressed through . . . federal remedies."[27] McCaw also erroneously asserts that the "denial of the LPSC's petition would not leave Louisiana consumers without recourse because 'the Section 208 complaint process would permit challenges to a carrier's rates or practices.'"[28] BellSouth similarly asserts that the FCC can protect subscribers by addressing matters concerning intrastate services pursuant to Section 201, 202 and 208 of the Act.[29] McCaw and BellSouth are confusing the

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[24]Second Report and Order, 9 FCC Rcd. at 1480.

[25]GTE Comments at 3.

[26]Id. at 11; see also id. at 22 (asserting that Sections 206 to 209 will permit complainants to "collect monetary damages for market abuses").

[27]McCaw Comments at 6, 13-14.

[28]Id. at 30 (citation omitted).

[29]BellSouth Comments at 19 n.15, 23.

FCC's regulation of interstate rates with the states' regulation of intrastate rates.[30]

The FCC does not have jurisdiction to remedy issues concerning intrastate rates in Louisiana. The question remains: When unreasonable or discriminatory intrastate CMRS rates arise in the future, will the subscribers in Louisiana have anyone to turn to? They will not be able to turn to the FCC.[31]

If the FCC does not allow the LPSC to retain its existing regulatory authority, the LPSC will be able to regulate only the "terms and conditions" of service.[32] Congress explained that "terms and conditions" include: customer billing information and practices and billing disputes and other consumer protection matters; facilities siting (i.e., zoning); transfer of control; bundling of services and equipment; and requirements that carriers make capacity available on a wholesale basis.[33] Thus, for example, if the LPSC's regulatory authority had been limited to such "terms and conditions" when Louisiana 8 was overcharging roamers, the LPSC would not have been able to intervene.[34]

However, the FCC has retained for itself the authority -- under Sections 201, 202,

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[30]McCaw also creates its own three-part test for granting states regulatory authority. McCaw Comments at 5-6. McCaw notably does not provide any FCC precedent supporting its three-part test. Additionally, the first two steps demonstrate McCaw's confusion concerning the FCC's jurisdiction under Title II. Thus, the test must be rejected.

[31]Uniformity arguments made by several commenters are similarly wrong. E.g., GTE Comments at 5; McCaw at 2, 8-9. The uniformity Congress intended was for similar services to receive similar regulatory treatment. H.R. Rep. No. 213, 103d Cong., 1st Sess., at 494 (1993). Congress did not state that it wanted similar regulatory treatment for intrastate services from state to state.

[32]47 U.S.C. § 332(c)(3)(A).

[33]H.R. Rep. No. 111, 103d Cong., 1st Sess., at 261 (1993).

[34]See LPSC Petition at 18-19.

206, 207, 208 and 209 of the Act[35] -- to intervene in such situations if they involve interstate services. Although the FCC's authority under Section 201, 202 and 208 of the Act was mandated by Congress,[36] the FCC deliberately retained authority under Sections 206, 207 and 209 of the Act in order to be able to protect subscribers, and award damages if necessary, "in the event there is a market failure."[37] At a minimum, the LPSC should be permitted to regulate carriers under the Louisiana statutes analogous to Sections 201, 202, 206, 207, 208 and 209 -- La. Rev. Stat. Ann. §§ 45:1163, 45:1176, 45:1502-04.[38]

The LPSC's traditional regulatory authority is demonstrated by an existing General Order issued March 12, 1974 (copy attached). Moreover, the Supreme Court of Louisiana, as recently as 1993, held that the Louisiana Constitution confers upon the LPSC exclusive and plenary jurisdiction to fix or change any rate to be charged by a public utility providing intrastate services in Louisiana. The Daily Advertiser, et al. v. Trans-La, et al., 612 So. 2d 7 (LA 1993).[39] The Court noted that the LPSC is unique in that, unlike the regulating entities in most other states which are statutory creatures subject to the authority of the respective state legislatures, the LPSC is a constitutional creature, the power of which

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[35]47 U.S.C. §§ 201, 202, 206-09.

[36]47 U.S.C. § 332(c)(1)(A).

[37]Second Report and Order, 9 FCC Rcd. at 1478-79.

[38]LPSC Petition Exhibits 5-7.

[39] The Louisiana Constitution vests jurisdiction over public utilities in general and rates in particular in the LPSC, providing:

> The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

La. Const. Art. IV, Sec. 21(B).

cannot be curtailed by the legislature. Id. at 10. Thus, the sovereign authority of the State of Louisiana to regulate intrastate CMRS rates is explicitly recognized in the Louisiana Constitution, which delegates that authority to the LPSC.

The BellSouth BOC filed two amicus curiae briefs in The Daily Advertiser in which they argued strenuously in favor of the LPSC's authority to regulate intrastate rates. "Within the sphere of rates and services, the LPSC's jurisdiction is exclusive. See, e.g., Louisiana Power & Light Co. v. Louisiana Pub. Serv. Comm'n, 523 So. 2d 850, 856 (La. 1988). Indeed, ... this jurisdictional authority must be exclusive in order to preserve the principle of uniformity which is an essential element of ratemaking." Original Amicus Curiae Brief of BellSouth Telecommunications, Inc., at 3. Copies of both BellSouth briefs are attached hereto.

Notwithstanding its unequivocal support of the LPSC's authority to regulate rates in The Daily Advertiser, BellSouth opposes the LPSC's retention of that authority here. The inconsistent analysis of BellSouth undermines its argument that, absent LPSC oversight of intrastate rates, consumers will nevertheless be protected from the kind of unreasonable and discriminatory practices by BellSouth that were cited in the LPSC petition.

It would be irrational for the FCC to deny the LPSC the opportunity to resolve issues concerning intrastate rates while the FCC has authority under the Act to resolve issues concerning interstate rates, especially when cellular service is principally used for intrastate calls.

GTE and McCaw also make erroneous assertions that the reasons the FCC gave for forbearing from applying certain sections of Title II of the Act to CMRS, also would support a denial of the LPSC's regulatory authority.[40] GTE and McCaw again demonstrate

[40]E.g., GTE Comments at 12; McCaw Comments at 3, 9-10.

a misunderstanding of Title II and misconstrue the FCC's forbearance decision. The statutory standards for the FCC to forbear from applying sections of Title II of the Act and the statutory standards for the FCC to grant continuing regulatory authority to the LPSC, both require the FCC to consider whether regulatory authority is required to ensure that rates are reasonable and nondiscriminatory.[41] The FCC began its forbearance analysis while already having authority under Sections 201, 202 and 208 of the Act. The FCC added Sections 206, 207 and 209 to this list, in order to protect subscribers from unreasonable and discriminatory rates.[42] The FCC decided to forbear from applying some of the other sections of Title II.[43] Regardless of its reasons for forbearing from applying these other sections, those reasons would not support a denial of state authority to regulate carriers under state statutes analogous to Sections 201, 202, 206, 207, 208 and 209 of the Act.[44]

In sum, the FCC should permit the LPSC to retain its regulatory authority in order to protect subscribers in the event that there is a market failure.

IV. THE FCC SHOULD FORBID RATE OF RETURN REGULATION

While Radiofone and NCRA agree that the LPSC should retain its existing authority to protect subscribers, no commenter supports the expansion of this authority to include the

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[41]47 U.S.C. §§ 332(c)(1)(A), 332(c)(3)(A).

[42]Second Report and Order, 9 FCC Rcd. at 1479.

[43]McCaw confuses "rate and tariff regulation" with those sections of the Act from which the FCC has decided to forbear. McCaw Comments at 24. "Rate regulation" also includes Sections 201, 202, 206, 207, 208 and 209 of the Act to which the FCC has not applied forbearance.

[44]E.g., id. at 16 (McCaw asserting that the FCC's decision to forbear from applying certain sections of Title II should preclude the LPSC from having any regulatory authority).

imposition of rate of return regulation on CMRS providers.[45] Carriers agree that rate of return regulation is inappropriate in a competitive market. Radiofone submits that the FCC should explicitly forbid the LPSC from imposing rate of return regulation on CMRS providers.

CONCLUSION

For the foregoing reasons, Radiofone respectfully requests the Commission to grant the LPSC the authority to continue its current form of regulation of CMRS providers.

However, to avoid harm to the developing competition in the CMRS market, Radiofone respectfully requests the Commission specifically to forbid the LPSC from initiating any form of rate of return regulation for CMRS providers.

Respectfully submitted,
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Dated: October 4, 1994

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[45] E.g., BellSouth Comments at 27-29; PCIA Comments at 15 (noting that the LPSC has not developed its rate of return regulations); Mercury Comments at 6-10; McCaw Comments, Exhibit A, at 18.

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

In re: Promotional Practices

At a session of the Louisiana Public Service Commission held at its office in Baton Rouge, Louisiana, on March 12, 1974, the matter of promotional practices of public utilities was considered.

It is the opinion of the Commission that in order to effect economies in the services provided by public utilities and thus keep rates as low as possible, promotional practices exclusive of advertising the services, rates and goodwill of the public utility should be eliminated. Accordingly, it is

ORDERED that:

A) No public utility shall, individually, or through agents, persons, firms, or corporations acting on its behalf, directly or indirectly, grant, give, or permit any payment, rebate, preference or prize, or discrimination of any sort, including the granting or denial of any utility service, for the purpose of enticing, persuading or causing a utility subscriber or potential subscriber to deal with or take any service of such public utility or any of its affiliates in preference to the service of any other public utility, including, but not by way of limitation:

1) Waiver of a- tariff provision requiring the posting or payment by any means service charges, line extension charges, facilities charges of any sort, or deposits;

2) Purchasing from any person property, goods, or services of any sort;

3) Performing or causing to be performed services of any sort.

B) No public utility shall offer or provide services or any other thing of value to any subscriber or potential subscriber, developer, architect, builder, investor, or other person which offering of service has not been previously approved by the Louisiana Public Service Commission.

C) The term public utility shall include electric cooperatives and public utility activity or service under the jurisdiction of the Commission.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
MARCH 12, 1974

CHAIRMAN

COMMISSIONER

COMMISSIONER

SECRETARY

SUPREME COURT OF STATE OF LOUISIANA

No. 92-C-0988
No. 92-C-1001

THE DAILY ADVERTISER, RICHARD D'AQUIN, MR. COOK LICENSING CORPORATION D/B/A MR. COOK RESTAURANTS, COMPAGNIE VERMILION INCORPORATED, COMPAGNIE CL-BM, LTD., and C. EARL EAGOOD, JR., Individually, and on behalf of all others similarly situated

(Plaintiffs-Appellees)

VERSUS

TRANS LA (A DIVISION OF ATMOS ENERGY CORPORATION D/B/A ENERGAS COMPANY), LOUISIANA INTRASTATE GAS CORPORATION, LIG CHEMICAL COMPANY, TUSCALOOSA PIPELINE COMPANY, and TRANS-LOUISIANA INDUSTRIAL GAS COMPANY, INC.

(Defendants-Appellants)

ON APPLICATIONS FOR WRIT OF CERTIORARI OR REVIEW FROM THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF LAFAYETTE, HONORABLE NED E. DOUCET, JR., HENRY L. YELVERTON AND JEANETTE THERIOT KNOLL, JUDGES

ORIGINAL AMICUS CURIAE BRIEF OF SOUTH CENTRAL BELL TELEPHONE COMPANY

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SUPREME COURT OF STATE OF LOUISIANA

No. 92-C-0988
No. 92-C-1001

THE DAILY ADVERTISER, RICHARD D'AQUIN, MR. COOK LICENSING CORPORATION D/B/A MR. COOK RESTAURANTS, COMPAGNIE VERMILION INCORPORATED, COMPAGNIE CL-BM, LTD., and C. EARL EAGOOD, JR., Individually, and on behalf of all others similarly situated

(Plaintiffs-Appellees)

VERSUS

TRANS LA (A DIVISION OF ATMOS ENERGY CORPORATION D/B/A ENERGAS COMPANY), LOUISIANA INTRASTATE GAS CORPORATION, LIG CHEMICAL COMPANY, TUSCALOOSA PIPELINE COMPANY, and TRANS-LOUISIANA INDUSTRIAL GAS COMPANY, INC.

(Defendants-Appellants)

ON APPLICATIONS FOR WRIT OF CERTIORARI OR REVIEW FROM THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF LAFAYETTE, HONORABLE NED E. DOUCET, JR., HENRY L. YELVERTON AND JEANETTE THERIOT KNOLL, JUDGES

ORIGINAL AMICUS CURIAE BRIEF OF SOUTH CENTRAL BELL TELEPHONE COMPANY

MAY IT PLEASE THE COURT:

BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company ("South Central Bell"), is, among other things, engaged in the business of providing telephone service throughout much of Louisiana. It is regulated in these activities by the Louisiana Public Service Commission ("LPSC" or "Commission"). As a regulated utility, South Central Bell has a strong interest in legal issues that affect the ratemaking process and regulatory law in Louisiana. South Central Bell, as amicus curiae, submits this brief in support of the applications for writ of certiorari or review filed by defendant-appellants Trans La (a division of Atmos Energy Corporation), Trans Louisiana Industrial Gas Company, Inc., Louisiana Intrastate Gas Corporation, LIG Chemical Company and Tuscaloosa Pipeline Company (collectively "defendants").

INTRODUCTION

In its opinion dated February 4, 1992, the Louisiana Court of Appeal, Third Circuit, relying upon the decision in South-West Utils., Inc. v. South Central Bell Tel. Co., 339 So.2d 425 (La. App. 1st Cir. 1976) ("South-West Utilities"), held that plaintiffs'

antitrust claims could be considered by the district court.[1] The Third Circuit's decision could seriously undermine settled principles of regulatory law if allowed to stand. South Central Bell takes no position with respect to the facts underlying plaintiffs' antitrust claims, but rather submits this brief for the sole purpose of addressing two points. First, the South-West Utilities decision is inapposite to the case at bar and, thus, was erroneously relied upon by the lower court in its February 4 decision. Second, allowing plaintiffs to litigate claims involving previously filed rates is in direct contravention to the filed rate doctrine and undermines the important regulatory goal of uniformity and consistency in ratemaking.

ANALYSIS

I. The South-West Utilities Decision Is Inapplicable to Plaintiffs' Claims

Plaintiffs are customers of a gas utility, claiming, inter alia, that the utility's filed rates were excessive and unreasonable because of alleged antitrust violations. In effect, this claim is an attempt not only to litigate the reasonableness of rates previously on file with and accepted by the LPSC, but also to recover alleged overpayments in direct contravention to the filed rate doctrine. An analysis of the claims underlying the South-West Utilities decision reveals that the Third Circuit's reliance on that decision was misplaced. As shown below, South-West Utilities involved allegations by a competitor that defendants were engaging in anticompetitive practices, giving rise to damages for the lost going concern value of the business or lost net future profits. The present case does not involve a competitor seeking lost going concern value or profits, but rather involves ratepayers seeking adjustments to rates previously filed with and accepted by the LPSC. Rather than supporting the Third Circuit's holding, the South-West Utilities decision expressly recognizes that the LPSC,

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[1] Plaintiffs alleged numerous claims in their suit and defendants filed exceptions to those claims. The Court of Appeal, however, only considered the exceptions with respect to the antitrust issue. See Daily Advertiser v. Trans-La, 1992 WL 19341, p. 7 n. 2 (La. App. 3d Cir., Feb. 4, 1992).

not the courts, should determine the reasonableness of rates and services of utilities.

In South-West Utilities, the plaintiff, South-West Utilities, Inc. ("South-West"), was "an interconnect company engaged in the business of providing office communications equipment and service" to customers in Louisiana. 339 So.2d at 426. South-West named as defendants South Central Bell, American Telephone & Telegraph Company ("AT&T"), and Western Electric, a subsidiary of AT&T and a direct competitor of South-West. South-West alleged that the defendants

> "engaged in and continued to engage in the practice of entering into contracts, agreements, conspiracies, and/or combinations in restraint of trade in the State of Louisiana and also of monopolization, attempts to monopolize and combinations and/or conspiracies to monopolize trade or commerce in the State of Louisiana, all in violation of the antitrust laws of the State of Louisiana ...."

Id. More specifically, South-West contended that the defendants priced their office communications equipment below cost in order to insulate them from competition. These below cost sales were allegedly subsidized by increased prices of their regulated service. According to South-West, these practices, along with others, effectively excluded South-West, a competitor, from the product market. Id. South-West sought treble damages in the amount of $7,879,914.00, representing alleged "severe economic injury to its business" in excess of $2.5 million. Id.

The defendants in South-West Utilities argued that the gravamens of plaintiff's complaint were the level of rates and the quality of service. Thus, according to the defendants, the matter should have been referred to the Louisiana Public Service Commission for consideration. Id. at 426-27. The district court agreed and dismissed the plaintiff's complaint on all grounds, except the count alleging unfair advertising. Id. at 427.

On appeal, the First Circuit Court of Appeal reversed the district court, finding that plaintiff was not attempting to litigate rates and services. According to the court, the issue presented was "the applicability vel non of the doctrine of primary jurisdiction." Id. In its analysis, the court first recognized

that one of the principal goals of the primary jurisdiction doctrine is to ensure uniformity of regulatory decisions. Id. at 428 (quoting Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-41, 27 S.Ct. 350, 355, 51 L.Ed. 553 (1907)). The court in South-West Utilities also recognized that the setting of rates is a matter within the "special administrative expertise" of the regulator. 339 So.2d at 428. The court stated: "We readily concede that rates and services of the various regulated industries in this state are indeed the responsibility of the Louisiana Public Service Commission ...." Id. at 429.

While recognizing the Commission's exclusive jurisdiction over rates, the court nevertheless disagreed with the district court's conclusion that South-West's complaint should be dismissed. The court explained:

> [W]e do not view plaintiff's efforts as an attempt to litigate rates and services. These factors, we feel, speak for themselves. Rather, plaintiff is here seeking to determine incidents of agreements and conspiracy to monopolize and restrain trade in specific contravention of our laws. These matters may in part be evidenced by particular rates, but by no means will rates alone be the sole criteria upon which such allegations will stand proved.

Id. The court recognized, however, that, if the plaintiff were attempting to "litigate rates and services," then the reasonableness of those rates and services should be determined by the Louisiana Public Service Commission:

> We can easily appreciate in matters involving the determination of fair rates and services, in order that regulated industries may reasonably prosper and expand without taking undue advantage of monopolistic situations, that the Public Service Commission is eminently more qualified to make such decisions in contrast to the courts.... It would indeed be an inefficient use of the courts and the Commission not to have the benefit of the Commission's expertise in such instances. Furthermore, the need for uniformity of rates dictates by the very essence of its nature a result that could not be otherwise.

Id. Thus, the court in South-West Utilities properly concluded that the LPSC, and not the courts, should determine the reasonableness of particular rates. The holding in South-West Utilities -- that the plaintiff's antitrust claims should not be dismissed -- was based on the court's conclusion that the plaintiff

was not challenging the reasonableness of the rates charged by the defendants.

The distinction between the South-West Utilities case and the case at bar is readily apparent from the allegations made and relief sought by the respective plaintiffs. In South-West Utilities, the plaintiff, a competitor, sought to recover damages for alleged economic injury to its business, resulting from anti-competitive behavior. Such damages would not have been measured by taking the difference between a filed rate and a hypothetical rate that supposedly would have been in place absent the illegal acts. Rather, damages would have been either the lost going concern value of the business or the lost net future profits on sales that plaintiff could have made but-for defendant's allegedly illegal activity.

In stark contrast to the allegations set forth in South-West Utilities, the plaintiffs in this case are challenging the reasonableness of the rates charged by the defendants: the plaintiffs contend that the rates on file with the LPSC for the relevant period were too high and thus were not just and reasonable. Unlike the plaintiff in South-West Utilities, the plaintiffs in the present case are not competitors of the defendants -- they are customers. Therefore, as ratepayers, the measure of the damages that the plaintiffs seek to recover would be the difference between (1) what they were charged during the period at issue, and (2) what they should have been charged had the defendants not allegedly engaged in the challenged conduct. The plaintiffs are seeking, in essence, a retroactive rate adjustment to compensate them for alleged excessive rates collected by the defendants during the relevant period. Plaintiffs' claim is in direct contravention to the filed rate doctrine, which prohibits a court from calculating damages based on any rates other than those filed with the regulatory body. See Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). The filed rate doctrine precludes a retroactive rate change "based on speculation about what the Commission might have done had it been

faced with the facts of this case." 453 U.S. at 578-79, 101 S.Ct. at 2931. "[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes, and ... except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251-52, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951).

Ostensibly following the South-West Utilities holding, the court of appeal in the present case erroneously concluded that the case could proceed because the plaintiffs asserted violations of the antitrust laws as the cause of the alleged excessive rates. The court erred by assuming that the right of the plaintiffs to proceed in court turns solely on the nature of the cause of action that was pleaded. The applicability of the filed rate doctrine turns not on the nature of the cause of action, but on the nature of the relief sought. The United States Supreme Court has consistently applied the filed rate doctrine regardless of the nature of the underlying cause of action. For instance, the Supreme Court has applied the doctrine to cases involving alleged antitrust violations,[2] to cases involving allegations of fraudulent conduct,[3] and to cases involving breach of contract claims.[4] The Court has even applied the filed rate doctrine where it recognized that the regulator could not grant the relief sought because it lacked the authority to adjust rates retroactively in order to award reparations. See Montana-Dakota Utils. Co., 341 U.S. at 254, 71 S.Ct. at 696-97; Arkansas Louisiana Gas Co., 453 U.S. at 578-580, 101 S.Ct. at 2930-31.

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[2] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986); Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922).

[3] Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951).

[4] Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981).